

# **WISCONSIN LEGISLATIVE COUNCIL STAFF**

## ***RULES CLEARINGHOUSE***

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## **CLEARINGHOUSE RULE 00-027**

### **Comments**

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

### **1. Statutory Authority**

It appears that the provisions of the rule relating to the applicability of agricultural performance standards and prohibitions to existing agricultural operations conflict with s. 218.16, Stats. Specifically, the statute states that an owner or operator of an agricultural facility or practice that is in existence before October 14, 1997, may not be required by the state or a municipality to comply with the performance standards, prohibitions, conservation practices or technical standards set forth in s. 281.16, Stats., unless cost-sharing is available to the owner or operator. Section NR 151.09 (1) appears to conflict with the statute because it requires the owner or operator of an existing agricultural operation to comply with runoff management standards regardless of the availability of cost-sharing.

In addition, the statute requires the department to promulgate rules that specify criteria for determining whether cost-sharing for implementation of practices is available. The statute provides that the rules may not allow a determination that cost-sharing is available unless the cost-sharing is at least 70% of the cost of compliance or is from 70% to 90% of the cost of compliance in cases of economic hardship, as defined in the rules. However, s. NR 151.09 (3), regarding cost-sharing availability, simply states that cost-sharing is considered to be available when cost-sharing has been offered for at least 70% of the eligible costs. It appears that the section should be modified to set forth the special requirement for cases of economic hardship and a method to determine whether economic hardship exists.

## **2. Form, Style and Placement in Administrative Code**

a. Sections NR 151.001 to 151.004 should constitute subch. I of ch. NR 151. The title of the subchapter could be “GENERAL PROVISIONS” and the remaining subchapters should be renumbered accordingly.

b. Section NR 151.002 (intro.) should be rewritten to read: “In this chapter:”.

c. In s. NR 151.002 (14), the word “rule” should be replaced by the word “section.” (The entire rule should be reviewed for this change.)

d. Much of the material contained in the note following s. NR 151.002 (15) is substantive in nature and should be placed in the text of the rule. Material contained in notes is not part of the substantive law created by the rule. [See s. 1.09, Manual.] Also, it appears that the first two sentences of the note should read: “If an operation . . . expansion on or after October 14, 1997 . . . an expansion on or after the effective date . . . .”

e. For purposes of determining conformance to the rule, how is it to be determined to which hydrologic soil group the soil in an area subject to the chapter belongs? In addition, the listing of the major hydrologic soil group set forth in the note following s. NR 151.002 (17) should be placed in the text of the rule.

f. In s. NR 151.002 (21), while the phrase “but is not limited to” is not preferred, if it is used, a comma should be inserted after the word “to.” (The entire rule should be reviewed for this change.)

g. Section NR 151.002 (46) refers to technical standards. The department should ensure that the requirements of s. 227.21, Stats., are met.

h. Section NR 151.002 (49) would be easier to comprehend if the information contained in that subsection were broken down into paragraphs. In addition, how is it to be determined whether a site is “susceptible to groundwater contamination or has the potential to be a direct conduit for contamination to reach groundwater”?

i. The requirements set forth in s. NR 151.08 should be rewritten in the following form: “No person may . . . .” [See s. 1.01 (2), Manual.]

j. In s. NR 151.11 (1), the phrase “shall apply” should be replaced by the word “applies.” (The entire rule should be reviewed for this change.)

k. It appears that a significant amount of the information contained in the note following s. NR 151.12 (3) (c) 2. b. is substantive in nature and should be placed in the text of the rule.

l. Section NR 151.21 (2) (b) should be rewritten to read: “The prime contractor shall install, apply and maintain BMPs in compliance with this section.”

m. The entire rule should be reviewed for the appropriate use of introductory material. An introduction grammatically leads into the following subunits of the rule. All other text, that is, text that does not lead grammatically into following subunits, should be a numbered portion of the rule. For example, see s. NR 151.12 (3) (c); the first sentence should be a numbered subdivision of this paragraph. [See s. 1.03, Manual.]

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

Several of the statutory sections cited as authority or subject to interpretation have been affected by 1999 Wisconsin Act 9 (the Biennial Budget Bill), and possibly other statutory provisions which have been enacted since the printed volumes of the statutes were prepared. The department should review all statutory references contained in the rule and insert language notifying the reader that the statutory provision has been affected by a recent act of the Legislature, as appropriate. For example, the citation to s. 281.16, Stats., should contain the notation “as affected by 1999 Wisconsin Act 9.”

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. Section NR 151.001 states that if the performance standards and prohibitions set forth in the chapter do not achieve water quality standards, the department may promulgate targeted performance standards. By what process is it to be determined whether the standards and prohibitions set forth in the chapter failed to achieve water quality standards?

b. For purposes of s. NR 151.002 (6), how is it to be determined whether construction activities “affect” land? For example, does construction activity “affect” land if runoff from the construction site crosses the land but that land surface is not otherwise changed? Also, it appears that the word “occur” should be inserted after the first occurrence of the phrase “construction activities.”

c. Section NR 151.002 (21) refers to both “topography” and “soil typography.” Do these terms refer to different things? If so, the rule should clarify the difference. If not, only one of the terms should be used.

d. What is meant by a “measurable narrative” in s. NR 151.002 (30)?

e. In s. NR 151.002 (34), a comma should be inserted after “subcontractors.”

f. In s. NR 151.002 (38), the phrase “an area” should be inserted at the beginning of the sentences in the paragraphs following that introductory material.

g. In s. NR 151.002 (39), “kept” should replace “found.”

h. Section NR 151.002 (45) refers to the “allowable” maximum rate of erosion. By whom is this rate of erosion allowed?

i. The phrase “in that water body” should be added to the end of s. NR 151.004.

j. In s. NR 151.02 (2), how is it to be determined what tolerable rate has been established for a certain type of soil? Who establishes that rate?

k. In s. NR 151.05 (1), the use of the word “new” can be vague. The provision should refer to activities taken on or after the effective date of the section. In sub. (3), the use of construct “a and b or c” is inherently confusing and should be rewritten.

l. In s. NR 151.09 (1) (a), “complying” should be replaced with “in compliance.” In addition, the rule should specify precisely which performance standards the rule refers to. (This comment also applies to sub. (2).) In sub. (1) (b) 2., the first sentence includes the phrase “corrective measures . . . do not involve eligible costs.” Does the inclusion of this phrase make redundant the additional phrase “regardless of the availability of cost-sharing”?

m. In the note following s. NR 151.009 (4), the rule should specify what is meant by a “303 (d) listed watershed” and “an outstanding or exceptional resource water.”

n. In s. NR 151.095 (2) (a), “projected” should be inserted before “enactment.”

o. Section NR 151.095 (2) (b) should specify a time by which the department must approve or deny a proposed ordinance.

p. Section NR 151.11 (1) refers to a “construction site upon which landed disturbing construction activity affects one or more acres of land.” This use of the term “construction site” conflicts with the definition of “construction site” set forth in the rule. Specifically, the definition set forth in s. NR 151.002 (6) specifies that a “construction site” means an area upon which one or more land disturbing construction activities are taking place which will affect five or more acres of land. In addition, the qualifying language following the first use of the term “construction site” is redundant, since that term is defined using that same language. [See also s. NR 151.21 (1).]

q. In s. NR 151.11 (2), it is unclear which person other than a landowner is a person “with control of a construction site.” In the situation in which a general contractor has complete control of the construction taking place on a site, is the general contractor or the landowner responsible for compliance with s. NR 151.11? This comment applies to all other provisions of the rule using similar language.

r. Section NR 151.11 (3) refers to a “soil erosion and sediment control plan.” In addition, several subsequent sections of the rule refer to different “plans.” Who is responsible for developing those plans? Must the plans be submitted to the department for approval before they are implemented? If so, what standards will the department use in reviewing those plans? If the plans are not required to be submitted to the department, must the responsible party maintain copies of the plan and make the plan available for inspection by the department upon request?

s. In s. NR 151.11 (3) (a), how is the “annual average sediment load” to be determined?

t. It is unclear whether the second sentence in the note following s. NR 151.11 (3) (a) is an exemption to the 80% requirement set forth in par (a). This point should be clarified.

u. In s. NR 151.11 (3) (g), “the standards set forth in” should be inserted after “achieved.”

v. Under s. NR 151.11 (5), must the responsible party receive approval from the department to cease to maintain best management practices (BMPs) when final stabilization has been achieved?

w. In s. NR 151.12 (1) (a), does the phrase “or was subject to s. NR 151.11” refer to a construction site which has undergone final stabilization? The rule should be more precise on this point. In addition, “A” should be inserted before the material in the subdivisions following the introductory material in par. (a).

x. In s. NR 151.12 (1) (a) 2., it is unclear how the size of the “portion of the site” is to be determined, for purposes of determining whether that portion has a cumulative area of one or more acres of parking lots and rooftops.

y. In the fifth sentence of the note to s. NR 151.12 (3) (c) 2. b., the word “on” should be inserted after the word “based.”

z. Section NR 151.12 (3) (c) 3. c. provides that areas where frozen ground limits infiltration are exempt from the infiltration requirements set forth in par. (c). Should this provision be rewritten to specify that the infiltration requirements need not be met when the ground is frozen, but that the infiltration requirements must be met when the ground is not frozen? This comment applies to other provisions of the rule using similar language.

aa. In s. NR 151.12 (4) (b), it appears that the final sentence should be rewritten to read: “A gas station pump area . . . beneath them and which has the availability . . . meet the requirements of this paragraph.”

ab. In s. NR 151.12 (5), the phrase “The standards required under this” should replace the word “This.”

ac. In s. NR 151.12 (7), the phrase “at least” should be inserted before “80%.” In addition, “suspends” should be changed to “suspended.”

ad. Section NR 151.13 (intro.) should specify who must develop and implement the municipal storm water management program referred to in that section.

ae. What is meant by the statement in the note following s. NR 151.13 (1) (d) that the general population “has secondary responsibility” in complying with municipal ordinances and other requests? Are members of the general population subject to enforcement procedures by the Department of Natural Resources for failing to meet this responsibility?

af. The requirements set forth in s. NR 151.13 (3) are vague and should be expanded upon considerably to give municipalities adequate notice of their responsibilities under that section.

ag. The requirement, in s. NR 151.13 (4) (a) that all of the requirements contained in sub. (3) must be implemented by February 28, 2013, is redundant since sub. (3) states that those requirements must be implemented by February 28, 2008.

ah. In s. NR 154.14 (1) (a) 2., the word “their” should be replaced by the word “its.” In sub. (2), both occurrences of the phrase “has the authority to” should be replaced by the word “may.”

ai. Section NR 151.21 (2) should be rewritten to clarify who has responsibility for complying with requirements set forth in that section. As written, it appears that the prime contractor and the owner of the construction site are jointly responsible. If that is the case, it should be stated explicitly. Also, in sub. (2) (a), the phrase “shall be responsible for complying” should be replaced by the phrase “shall comply.”

aj. In s. NR 151.21 (3) (g), the phrase “the goals set forth in” should be inserted after “achieved.”

ak. In s. NR 151.22 (4) (a), “riparian area” should be defined. In addition, it is unclear whether the language regarding the “minimum width of the riparian area” is a standard used to determine whether an area is subject to the special requirements set forth in that section. This provision should be clarified.

al. In s. NR 151.22 (5), “The requirements of this” should replace the word “This.”

am. In s. NR 151.22 (6), it is unclear whether the BMPs must be appropriately maintained forever. If so, who is responsible for maintenance of the BMPs? Does this responsibility carry forward to a new owner of the land if the land is sold? If so, this requirement should be specifically stated.

an. In s. NR 151.31 (3), the word “appoints” should be replaced by the phrase “shall appoint.”